IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1156 OF 2005

Shri Devendra Damodar Nayak .. Appellant

Versus

Shri Rajendra Sambhaji More .. Respondent

Mr.Amber Joshi i/b S.M.Oak for appellant

Ms Gauri Godse for respondent

CORAM : P.V.KAKADE, J.

DATE : 26TH SEPTEMBER, 2005.

P.C.:

1. The appellant has preferred this appeal against the judgment and order passed by Addl. District Judge, Raigad at Alibag dated 24.12.2004 allowing the appeal and setting aside the order passed by Civil Judge, Junior Division, Roha dated 31.12.2001 whereby suit of the plaintiff came to be decreed.

2. I have heard the learned counsel for both the parties. Perused the record.

3. The plaintiff filed the suit for perpetual as well as mandatory injunction on the ground that the defendant was occupier of the adjacent plot had encroached upon his property while making construction. The defendant contested the suit and denied the allegations stating that he had not made any encroachment over the plainitff's property and sought dismissal of the suit.

. The trial court adjudicated the dispute holding that the plaintiff had proved his possession over the suit land and it was further proved that the defendant had encroached upon the suit property and therefore, the plaintiff was entitled for perpetual as well as mandatory injunction and decreed the suit. The appeal was carried to the District Court. The learned Addl. District Judge after hearing both the parties and perusing the evidence on record came to the conclusion that the trial court had committed error in recording findings and allowed the appeal dismissing the suit. Hence the present appeal.

4. At the out set, it must be noted that there is absolutely no substantial question of law involved in this appeal and the dispute revolves around factual aspect of the issues involved pertaining to the documents on record.

. The record shows that in the court of trial the TILR was appointed as Court Commissioner in order to pin point the element of encroachment, if any, made by defendant towards the land of the plaintiff. However, the Commissioner’s report (Exh.59), was not at all satisfactory, the map drawn by the scale and measure and had given the details of the measurement by length and width of the plot of the plaintiff as well as defendant. However, it is not specifically mentioned that the portion shown by letters B, C, F & G in the map came to be owned by the plaintiff as well as the defendant and the witness who drew the map Exh.59 for the first time in the court stated that there was encroachment of 10 sq. meter over the land of the plaintiff though it was not mentioned in the map itself. The learned appellate court judge has held that the Surveyor was unable to satisfy how he had calculated the encroachment of 10

sq.mt. when he had pointed out the area of the plot shown by the letters B, C, F, G as 15 sq. mt.

. Besides this aspect, it is also clear from the record that both the parties have obtained permission of the Municipal Authorities for construction and sanctioned plans are brought on record which are sufficient to show that both the parties have made constructions as per the plan. It is also seen from the record that construction of defendant is as per the permission dated 10.10.1998, which specifically mentioned that the western side wall of the construction of the house of the defendant should be a common wall just touching to the eastern side wall of the plaintiff. On the other hand, with regard to the permission obtained by the plaintiff, Condition No.24 mentioned therein showed that the permission was granted subject to condition that the adjoining owners of the plot would be required to do the construction touching to the common wall and the holder of the permission would not have any authority to obstruct the construction if done by the adjoining owner of the plot touching or with common wall. Under the circumstances, the evidence is found to be not satisfactory to hold that there is an

encroachment made by the defendant over the property of the plaintiff and as such the learned appellate court judge has rightly reversed the findings recorded by the trial court and dismissed the suit. In view of this position, it is not fit case to interfere with the order passed by the lower appellate court, as it is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. Hence, no interference is called for and the appeal stands dismissed with no order as to costs.